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IN THE SUPREME COURT OF THE UNITED STATES

DAVID A. ZUBIK, ET AL. v. SYLVIA BURWELL, ET AL.

PRIESTS FOR LIFE, ET AL. v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.

ROMAN CATHOLIC ARCHBISHOP OF WASHINGTON, ET AL. v. SYLVIA BURWELL, ET AL.

EAST TEXAS BAPTIST UNIVERSITY, ET AL. v. SYLVIA BURWELL, ET AL.

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL. v. SYLVIA BURWELL, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL. v. SYLVIA BURWELL, ET AL.

GENEVA COLLEGE v. SYLVIA BURWELL, ET AL.

On Writs of Certiorari to the U.S. Courts of Appeals for the Third, Fifth, Tenth, and District of Columbia Circuits

BRIEF OF 50 CATHOLIC THEOLOGIANS AND ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 50 Catholic theologians and ethicists. A complete list of *amici*, with their qualifications and institutional affiliations, is included in the Appendix to this Brief. *Amici* believe that the religious-liberty claims of Petitioners in these consolidated cases, especially those Petitioners who profess the Roman Catholic faith, are well founded. *Amici* submit this brief to provide the Court with an informed perspective of Catholic moral theology on the questions of moral complicity and cooperation in wrongdoing raised in these cases.

The courts below concluded that Petitioners' compliance with the Government's directive aimed at providing insurance coverage for abortifacients, contraceptives, and sterilization to their employees (the "Mandate") would not render the Petitioners complicit in religiously forbidden behavior, and thus would not substantially burden Petitioners' religion. In so ruling, these courts erroneously sought to "arrogat[e]" to the federal judiciary "the authority to provide a binding national answer to this religious and philosophical question."

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all petitioners and respondents have filed notices of blanket consent to the filing of *amicus* briefs with this Court.

Burwell v. *Hobby Lobby Stores*, 134 S. Ct. 2751, 2778 (2014). Moreover, these judgments by federal courts about profound and difficult questions of moral complicity evidently rested on misapprehensions about the theological principles of the religious traditions at issue, including the Roman Catholic tradition.

Contrary to the rulings of the courts below, Petitioners' objections to complying with the Mandate via the so-called "accommodation" reflect a reasonable application of principles of Catholic moral theology and ethics. Based on such principles, Petitioners may reasonably conclude that complying with the Mandate would violate their Catholic faith by forcing them to become complicit in grave wrongdoing.

SUMMARY OF THE ARGUMENT

I. The Courts of Appeals below erred by substituting their judgment for that of Petitioners on the quintessentially theological question whether complying with the Mandate would violate Petitioners' religious consciences. The religious objections to the Mandate of Petitioners—particularly those Petitioners who profess the Roman Catholic faith—reflect a reasonable application of principles of Catholic moral theology and ethics.

A. First, based on the Catholic moral tradition, Petitioners can reasonably conclude that compliance with the Mandate would involve them in "formal" cooperation with wrongdoing, which is never permissible under Catholic doctrine. "Formal" cooperation in wrongdoing occurs when one commits an action that contributes to or assists another's

wrongful act, in such a way that the cooperator thereby shares in the wrongful intention of the other actor.

Many theologians in the Catholic tradition have concluded that one who knowingly obeys a command to act in furtherance of a wrongful objective typically shares thereby in the intention to achieve the wrongful objective, even if the cooperation is performed reluctantly or under duress. On this view, obedience to such a command constitutes formal cooperation with wrongdoing, and it is not permissible, regardless of whether the wrongful objective is actually achieved. Petitioners may reasonably conclude that complying with the Mandate—whether by submitting Employment Benefits Security Administration Form 700 ("Form 700") to their insurer or third-party administrator, by providing the requisite notice of objection and health plan information to HHS (the "HHS Notice"), or by maintaining a contractual relationship with an insurer or TPA through which the Government has arranged to provide forbidden coverage to Petitioners' own employees—would force them to share in the Government's intention to achieve the wrongful objectives of providing coverage for, and promoting the use of, abortifacients, contraceptives, and sterilization.

Similarly, applying principles of Catholic moral theology, Petitioners can reasonably conclude that complying with the Mandate by submitting either Form 700 or the HHS Notice would involve formal cooperation in wrongdoing, because any such notice constitutes a means that is specifically designated and intended for a unique wrongful purpose. Petitioners may reasonably infer from the Catholic

tradition that submitting information whose sole purpose and function is to facilitate the Government's execution of a forbidden action would necessarily involve sharing in the intention to perform the action. Again, this would constitute formal cooperation with wrongdoing.

B. Moreover, applying principles of Catholic moral theology, Petitioners can also reasonably conclude that complying with the Mandate via the "accommodation" would involve impermissible material cooperation in wrongdoing. Material cooperation occurs when the cooperator facilitates or assists in the performance of a forbidden action without sharing in the wrongful intention. Among other requirements, material cooperation must be justified by a "proportionate reason" to perform the cooperative action. In this case, Petitioners can reasonably conclude that, by submitting Form 700 or the HHS Notice or by maintaining a health plan or insurance program through which objectionable coverage is provided, they would impermissibly cooperate in or assist the forbidden actions of providing coverage for, and promoting the use of, abortifacients, contraceptives, and sterilization.

Several factors support the determination that such material cooperation would be impermissible. First, the forbidden actions in this case—abortion, contraception, and sterilization—are grave wrongs under the Catholic faith. The use of abortifacient drugs, in particular, involves the taking of innocent human life in the Catholic view, and thus it is particularly grave. Second, Petitioners can reasonably conclude that the "accommodation" threatens to make them "but-for" or essential causes of providing such services, which is viewed as an

aggravating factor by many Catholic theologians. Third, the Catholic Petitioners in particular may reasonably infer from the Catholic bishops' categorical denunciations of the Mandate that Church authorities counsel against compliance with the Mandate in any form. Fourth, Petitioners can reasonably conclude that there is no proportionate reason that would justify their material cooperation in such very grave wrongs, such as the taking of human life.

C. In addition, Petitioners can reasonably conclude that their compliance with the Mandate in any form would cause "scandal," or encouraging others to engage in wrongdoing. Scandal is an independent wrong under Catholic doctrine. Petitioners can reasonably conclude that complying with the Mandate would create the appearance of complicity in the Mandate, would undermine their public witness against the use of abortifacients and contraceptives, and would authorize and encourage others to comply with the Mandate. This provides an independent reasonable justification for their objection to compliance, according to the Catholic faith.

In sum, all Petitioners—especially those professing the Roman Catholic faith—have asserted well-founded religious objections to compliance with the Mandate in any form. Their views reflect an eminently reasonable interpretation of Christian theology from the perspective of the Roman Catholic tradition. The lower courts erred by attempting to substitute their judgment for that of Petitioners on this "difficult and important question of religion and moral philosophy." *Hobby Lobby*, 134 S. Ct. at 2778.

ARGUMENT

I. The Roman Catholic Petitioners' Conclusion That Complying with the Mandate, Even Via the "Accommodation," Would Violate Their Catholic Faith Reflects a Reasonable Application of Principles of Catholic Moral Theology.

Without exception, the Courts of Appeals in these consolidated cases improperly substituted their own judgment for that of Petitioners on a "difficult and important question of moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. These erroneous rulings purported to "arrogat[e]" to the federal judiciary "the authority to provide a binding national answer to this religious and philosophical question," *id.*, in contravention of this Court's consistent instructions. "For good reason," this Court has "repeatedly refused to take such a step." *Id.*

In *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), this Court stated that it would accept a religious believer's interpretation of the dictates of his or her own religion unless the asserted claim was "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. The judgment of the religious Petitioners in these cases—particularly those practicing the Roman Catholic faith—that compliance with the Mandate would violate their religious conscience is neither "bizarre" nor "clearly

nonreligious in motivation." *Id.* Rather, it reflects a reasonable application of basic principles of Catholic moral theology.

Theologians and ethicists in the Catholic tradition employ a well-developed set of concepts to analyze issues of complicity in the immoral actions of others. In ascertaining whether knowingly facilitating or contributing to forbidden actions is morally permissible, Catholic moral theology speaks of "cooperation" in the forbidden actions. "Cooperation," in this context, is understood broadly as "the participation of one agent in the activity of another agent to produce a particular effect or joint activity." Russell E. Smith, *The Principles of Cooperation in Catholic Thought*, *in* THE FETAL TISSUE ISSUE: MEDICAL AND ETHICAL ASPECTS 81, 84 (Peter J. Cataldo & Albert S. Moraczewski eds., 1994).

The Catholic tradition draws a distinction between "formal" and "material" cooperation. Broadly speaking, "formal" cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. *See* Orville N. Griese, CATHOLIC IDENTITY IN HEALTH CARE: PRINCIPLES AND PRACTICE 387-88 (1987) ("Griese"); Germain Grisez, THE WAY OF THE LORD JESUS, VOL. 3: DIFFICULT MORAL QUESTIONS 872-73 (1997) ("Grisez"). "Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending." Grisez, at 873.

"Material" cooperation occurs when the believer could reasonably foresee that his or her action will facilitate or assist the performance of the objectionable action by the third party, but does not share in the principal agent's intention to commit the action. Grisez, at 873; Griese, at 388. Material

cooperation is sometimes permissible, and sometimes impermissible. To determine whether it is permissible, one must balance the good one hopes to achieve by indirectly cooperating in wrongdoing against the nature of the bad action and the closeness of one's contribution to it. Grisez, at 876. Among other things, a "proportionate reason"—*i.e.*, some good to be achieved that is significant enough to counterbalance the wrongful action and the closeness of one's complicity in it—is required to justify material cooperation in a forbidden action. Grisez, at 876; *accord* Gary Atkinson et al., A MORAL EVALUATION OF CONTRACEPTION AND STERILIZATION 79-80 (1979) ("Atkinson").

Based on principles of Catholic moral theology, practitioners of the Roman Catholic faith could very reasonably conclude that compliance with the Mandate—whether by executing Form 700, by submitting the HHS Notice, or by maintaining a health plan or insurance relationship through which the objectionable coverage is provided—would involve either formal cooperation in wrongdoing, or impermissible material cooperation in serious wrongdoing, and would therefore be gravely wrongful.

A. Petitioners Can Reasonably Conclude That Complying with the Mandate Via the "Accommodation" Would Involve Formal Cooperation In Wrongdoing, Which Is Never Permissible.

First, under Catholic moral theology, Petitioners can reasonably conclude that complying with the Mandate in any form would constitute impermissible "formal" cooperation in forbidden actions such as

abortion, contraception, sterilization, and the education and counseling programs designed to promote them. Such formal cooperation in grave wrongs would be itself gravely wrongful.

Petitioners in these cases have asserted that it would violate their religious consciences to authorize anyone to arrange for or make payments for contraceptives, sterilization, and abortifacients; to take action that triggers the provision of such coverage; to maintain a health plan or ongoing insurance relationship through which the Government arranges to provide such coverage; or to participate in a scheme, the sole purpose of which is to provide such products. *See, e.g., Little Sisters of the Poor Home for the Aged* v. *Sebelius*, 6 F. Supp. 3d 1225, 1243-44 (D. Colo. 2013) (detailing such objections on behalf of some of the Roman Catholic Petitioners). These objections are consistent with the judgment that participation in the Government's regulatory scheme would constitute formal cooperation in grave wrongdoing—a conclusion that reflects a reasonable interpretation of the Catholic faith.

Many theologians in the Catholic tradition have concluded that an agent who obeys a command to perform an action in furtherance of an immoral objective comes to share in the immoral intention of the commander, even if the objective is contrary to the agent's personal preferences, and even if the action is performed under duress. On this view, such an agent engages in formal cooperation with wrongdoing, which is never permissible.

For example, since at least the seventeenth century, Catholic moral theologians have discussed the hypothetical case of a servant who is ordered by

his master to hold a ladder against a house so that the master may ascend and enter a window to commit a forbidden action, such as burglary or adultery. *See, e.g.*, G.E.M. Anscombe, *War and Murder*, *in* NUCLEAR WEAPONS AND THE CHRISTIAN CONSCIENCE 58 (Walter Stein ed. 1981) ("Anscombe") (discussing this hypothetical and its history).

Many Catholic theologians have concluded that such a hypothetical servant, by obeying the command, thereby shares in the master's immoral intention of committing burglary or adultery, and thus formally cooperates in the master's illicit scheme. *See id.*, at 58. Under Catholic moral theology, such formal cooperation is impermissible, even when committed under duress, and regardless of whether the master actually succeeds in perpetrating the wicked action. Thus, many Catholic theologians and philosophers reject the view that, in Elizabeth Anscombe's words, "it is all right for a servant to hold the ladder for his criminous master so long as he is merely avoiding the sack by doing so." *Id.* Indeed, as Anscombe notes, Pope Innocent XI issued a bull in 1679 that rejects this view as well. *See id.*; *see also* Charles F. Capps, *Formal and Material Cooperation with Evil*, 89 AMERICAN CATHOLIC PHILOSOPHICAL QUARTERLY 681, 690 (2015) (quoting this papal bull in translation).

Petitioners may very reasonably conclude that the Mandate places them in a situation analogous to the servant who obeys a command to participate in the master's immoral scheme. On this view, the "criminous master," Anscombe, at 58, is the Government, which is attempting to implement a program designed to promote the use of contraceptives and abortifacients. Indeed, it is beyond dispute that the purpose of the Mandate is to

promote the availability and usage of contraceptives, abortifacients, and elective sterilization. *See, e.g.*, U.S. Dep't of Health and Human Services, Health Resources and Services Administration, Women's Preventive Services Guidelines, *at* http://www.hrsa.gov/womensguidelines/.[2] This objective is plainly impermissible under Catholic doctrine. *See infra*, Part I.B.1.

Moreover, it is eminently reasonable for Petitioners to conclude that the Government's directive to comply with the Mandate serves the purpose of furthering this plainly impermissible objective, since such compliance is designed to facilitate providing contraceptive coverage to Petitioners' plan participants. *See, e.g.*, 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014) (laying out HHS's use of form information to assign to third party the obligation for providing contraceptive coverage to objector's employees). Accordingly, based on principles of Catholic moral theology, Petitioners can reasonably conclude that complying with the "accommodation" would constitute formal cooperation in wrongdoing.

If performed, such formal cooperation would be impermissible even if Petitioners are solely motivated to avoid the Act's crippling financial penalties, and no matter how strongly Petitioners might object in their hearts to the provision of abortifacients, contraceptives, or sterilization. This is because compliance with the Mandate would involve choosing an objectively immoral means (formally cooperating with wrongdoing) to achieve an otherwise acceptable end (avoiding the Act's financial penalties), which is

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[2] All internet sources were last visited on January 8, 2016.

never permissible under Catholic doctrine. *See* CATECHISM OF THE CATHOLIC CHURCH ¶ 1753 (1994) ("Catechism"). By complying with the Mandate's directive with knowledge of the Government's objectives, on this view, Petitioners would thereby share the Government's improper intentions and become complicit in its actions.

Moreover, such formal cooperation would be impermissible regardless of whether the Government actually succeeded in its objective of promoting the use of contraceptives, abortifacients, and sterilization. *See Roman Catholic Archdiocese of New York v. Sebelius*, 987 F.Supp.2d 232, 243 (E.D.N.Y 2013) ("This alleged spiritual complicity is independent of whether the scheme actually succeeds in providing contraceptive coverage."). Regardless of whether the *effect* of Petitioner's compliance with the Mandate is actually to trigger the provision of forbidden services, Petitioners may reasonably conclude that promoting such services is the *purpose* of the actions HHS requires in order for them to comply with the Mandate. *See* 79 Fed. Reg. at 51,095 (stating that the "accommodation" was designed in part to "implement the policies in the July 2013 final regulation," the first of which is to "provide women with access to contraceptive coverage without cost-sharing," 78 Fed. Reg. 39,870, 39,872 (July 2, 2013)). Petitioners may reasonably conclude that, by taking the required actions, they would thereby share in that impermissible purpose, and thus become formally complicit in wrongdoing.

For similar reasons, under principles of Catholic moral theology, Petitioners can reasonably conclude that they would become guilty of formal cooperation in wrongdoing by submitting notices to their insurers

or to the Government—such as Form 700 or the HHS Notice—that are specifically designed to enable the Government to authorize or obligate others to engage in gravely wrongful actions, regardless of whether the others actually perform those actions. In the Government's regulatory scheme, the notice that each Petitioner must submit to satisfy the "accommodation" operates as a certificate that designates, authorizes, and even obligates a third party to engage in forbidden actions. Petitioners may reasonably conclude that providing such a certificate is analogous to providing a means that is specifically tailored for use in forbidden action, and thus involves formal complicity in the intention to perform such actions, regardless of whether the actions are carried out by the third party.

In other words, if you provide someone with an item that is specifically designed for a particular use (such as a gift certificate for a specific product, a gadget designed for a unique use, or a form that authorizes a specific act), one may reasonably conclude that you consent to the performance of that particular use. If the designated action is wrongful, your consent is immoral under Catholic doctrine.

An illustrative example of this principle arose in Germany in the late 1990s. In 1995, Germany legalized abortion during the first trimester, "provided that the woman had a certificate that she had attended an approved counseling center" before seeking the abortion. Bishop Anthony Fisher, O.P., *Cooperation in Evil: Understanding the Issues*, *in* COOPERATION, COMPLICITY & CONSCIENCE: PROBLEMS IN HEALTHCARE, SCIENCE, LAW, AND PUBLIC POLICY 27, 54 (Helen Watt ed., 2005) ("Fisher"). The certificate of the counselor authorized the woman to

receive an abortion. Certain German bishops, while condemning the abortion law, sought to have Catholic counselors participate in the state-approved counseling program. *Id.* at 47. These bishops anticipated that Catholic counselors would tend to dissuade women from having abortions, and that the participation of Catholic counselors would reduce the overall number of abortions. *Id.* Thus, these bishops reasonably anticipated that the participation of Catholic counselors in the program would actually prevent abortions from happening.

Notwithstanding these beneficial anticipated effects, the program came under papal scrutiny. In 1998, Pope John Paul II authored a letter to the German bishops, calling on them to "take care that ecclesiastical institutions do not become co-responsible for the killing of innocent children" by issuing such counseling certificates that were designed under German law to authorize women to receive abortions. Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference ¶ 4 (Jan. 11, 1998), *at* http://w2.vatican.va/content/john-paul-ii/en/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany.html ("Papal Letter"). Though he applauded the well-meaning intentions of the Catholic pregnancy counselors, *id.* ¶ 6, the Pope expressed grave concern that, by providing women with certificates that authorized the women to receive abortions, Catholic counselors "are involved in carrying out a law that leads to the killing of innocent human beings." *Id.* ¶ 7 Because such involvement made Catholics morally complicit in abortion, the Pope "urgently" exhorted the German bishops to ensure that the practice would cease. *Id.*

Notably, the Pope's directive against Catholic participation in the program was not dissuaded by the anticipated beneficial effects of such participation.

From such papal guidance, Petitioners can reasonably conclude that they would share in the intention to promote abortion and contraception if they were to submit notices whose purpose is to authorize, enable, and/or obligate third parties to provide their employees with objectionable insurance coverage, regardless of whether the third party actually engages in the forbidden action. "The signing of the waiver certificate is coercively mandated by the [Government] for the purpose of having a signed 'ticket' or 'coupon' specifically triggering or authorizing the distribution of funds for" forbidden actions. Steven A. Long, THE TELEOLOGICAL GRAMMAR OF THE MORAL ACT 217-18 (2d ed. 2015). As one Catholic commentator stated in a related context, moral complicity may be greater where there is an "essential tie" or "intelligible link" between the cooperator's action and the wrongdoing. Melissa Moschella, *The HHS Mandate and Judicial Theocracy*, THE PUBLIC DISCOURSE (Jan. 3, 2013), http://www.thepublicdiscourse.com/2013/01/7403/. There is such an "essential tie" or "intelligible link" between complying with Mandate via the "accommodation" and the forbidden action, because the sole function of the required information in the Government's regulatory scheme is to designate and authorize another to perform the forbidden action.

B. Petitioners Can Reasonably Conclude That Complying with the Mandate Would Constitute Unjustifiable Material Cooperation In Wrongdoing.

Under principles of Catholic moral theology, Petitioners can also reasonably conclude that complying with the Mandate by submitting Form 700 or the HHS Notice, or by maintaining a health plan or ongoing insurance relationship through which the objectionable coverage is provided, would involve unjustifiable material cooperation with wrongdoing.

As an initial matter, Petitioners can reasonably conclude that their compliance with the Mandate will likely have the practical effect of increasing the provision of abortifacients and contraceptives to their employees. Indeed, as noted above, that is the very purpose of the Government's regulatory program. *See* 79 Fed. Reg. at 51,095 (noting that the purpose of the "accommodation" is to provide the Government with "the minimum information necessary for the Departments to implement the policies of the July 2013 final regulations"). The Government's vigorous litigation of these cases confirms the Government's evident belief that Petitioners' compliance with the Mandate will have the practical effect of increasing access to, and use of, abortifacients, contraceptives, and sterilization.

Because Petitioners may reasonably conclude that complying with the Mandate via the "accommodation" could have the practical effect of increasing and promoting the use of contraceptives and abortifacients among their employees, Petitioners may also reasonably conclude that doing so would involve unjustifiable material cooperation with such wrongdoing. Several objective criteria are frequently invoked in the Catholic theological tradition to determine whether material cooperation in another's bad action is permissible. These objective

criteria support a reasonable conclusion that compliance with the Mandate would involve impermissible material cooperation in grave wrongdoing.

1. Compliance with the Mandate requires cooperation in actions that are gravely wrongful under Catholic doctrine.

One important criterion for assessing the permissibility of material cooperation is how grave or serious is the wrongdoing that the believer is assisting. The graver the wrongdoing, the more problematic is cooperation in that wrongdoing. In general, "the more serious the harm from the sin, the more significant must be the good sought to justify cooperation." Atkinson, at 80. A proportionately stronger justification is required "the graver the evil of the principal agent's act in itself," and "the graver is the harm which may be caused to third parties, especially the innocent," by the objectionable action. Fisher, at 27, 54.

The Mandate requires employers to cooperate in actions that are very gravely wrongful according to Catholic teachings. First, under Catholic doctrine, the use of abortifacient drugs and devices constitutes a moral wrong of the first order. The Catholic Church teaches that "[h]uman life must be respected and protected absolutely from the moment of conception." Catechism, ¶ 2270. "From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id.* Under Catholic doctrine, the destruction of innocent

human life—including embryonic human life—is a violation of the Fifth Commandment, "Thou shalt not kill," and thus a serious moral wrong. *Id.* ¶ 1858. "Since it must be treated from conception as a person, the [human] embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being." *Id.* ¶ 2274.

The United States Conference of Catholic Bishops has authoritatively applied this teaching against destroying human life to Catholic health care providers:

> Abortion is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation.

United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 45 (5th ed. 2009), available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf ("Directives"). Regardless of the Government's definition of "abortion," the Catholic faith views the destruction of a human embryo at any time after conception—including during "the interval between conception and implantation of the embryo," *id.*—as an abortion, and gravely wrongful.

The Catholic Church also deems contraception and elective sterilization to be seriously wrongful. "[E]very action which, whether in anticipation of the

conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible" is impermissible. Catechism ¶ 2370. "Any sterilization which has the sole immediate effect of rendering the generative faculty incapable of procreation remains absolutely forbidden according to the doctrine of the Church." Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization in Catholic Hospitals (Quaecumque Sterilizatio)* ¶ 1 (March 13, 1975), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html.

In addition, the Government's scheme of coverage also extends to "patient education and counseling" for covered employees and their dependents in the use of abortifacients and contraceptives. 77 Fed. Reg. 8724, 8725 (Feb. 15, 2012); see also 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2013); Health Res. & Serv. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines/. In the report upon which the Mandate's contraceptive requirements are based, the Institute of Medicine made clear that the intended purpose of the contraceptive education and counseling requirement is to increase the use of contraceptives, including those that function as abortifacients:

> [S]tudies show that postpartum contraceptive counseling increases contraceptive use , that counseling increases method use among adolescents in family planning clinics, that counseling decreases nonuse of contraception

> in older women of reproductive age who do not want a future baby, and that counseling of adult women in primary care settings is associated with greater contraceptive use

Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011); *see also* Gina M. Secura et al., *The Contraceptive CHOICE Project: Reducing Barriers to Long-Acting Reversible Contraception*, AM. J. OBSTETRICS & GYNECOLOGY, Aug. 2010, at 115e.1, 115e.4 (attributing increased use of abortifacient contraceptive methods to increased patient education, among other factors). There can be no doubt that such "education and counseling" programs will instruct and encourage women to use abortifacients and contraceptives, and thus tend to increase such wrongful actions. Any participation in such programs by Catholic employers could also constitute the independent wrong of "scandal" under Catholic doctrine, as discussed further below. *See infra* Part I.C.

2. Compliance with the Mandate could cause Petitioners to become necessary or "but-for" causes of gravely wrongful actions.

In weighing the material cooperator's degree of moral responsibility for the forbidden action of a third party, many Catholic moral theologians consider whether the forbidden action would have happened anyway if the believer had not facilitated it. In the commonly used parlance, one considers whether the believer is a "necessary" or "essential" contributor to the objectionable action. One important factor in assessing material cooperation is "how indispensable

is the cooperation for the sinful action to occur." Atkinson, at 80. Material cooperation is particularly problematic when one "participate[s] in the evil act by doing something necessary for the actual performance of the evil act," such that "one's action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator." Benedict M. Ashley, O.P et al., HEALTH CARE ETHICS: A CATHOLIC THEOLOGICAL ANALYSIS 56 (5th ed. 2006); *see also* The Ethicists, The National Catholic Bioethics Center, *Cooperating with Non-Catholic Partners*, *in* CATHOLIC HEALTH CARE ETHICS: A MANUAL FOR ETHICS COMMITTEES 27/2 (Peter J. Cataldo & Albert S. Moraczewski eds., 2009) (stating that a Catholic hospital would be morally responsible when "immoral procedures would not be taking place but for the collaboration" of the hospital). A much stronger justification is required "[i]f forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects." Grisez, at 882-83. "[T]he more difficult it would be for the principal agent to proceed without the cooperator's involvement," the more serious the justification required to cooperate. Fisher, at 55.

In these cases, Catholic Petitioners have attested that it would violate their religious consciences to take an action that serves as "the but-for cause of the provision of contraceptives, sterilization, and abortifacients." *Little Sisters*, 6 F.Supp.3d at 1238. This statement accurately reflects the concern in Catholic moral theology with becoming the essential cause of forbidden actions. If Petitioners submit Form 700 or the HHS Notice as required by the "accommodation," there is a reasonable probability

that they will trigger the provision of contraceptives and abortifacients to their employees that otherwise would not have happened. Likewise, if Petitioners maintain a health plan or ongoing insurance relationship through which the Government undertakes to provide the objectionable coverage, it is reasonably foreseeable that their actions will contribute to the use of abortifacients, contraception, and sterilization that otherwise would not have happened. Petitioners' concerns about becoming essential causes of such actions, moreover, derive strong support from the fact that the Government, by enforcing the Mandate, evidently intends to increase the incidence of the forbidden actions. Thus, Petitioners can reasonably conclude that compliance with the Mandate threatens to make them the "but-for" causes of grave moral wrongs, including the taking of innocent human life.

3. Petitioners can reasonably conclude that the Catholic bishops have counseled against complying with the Mandate.

Furthermore, in assessing whether compliance with the Mandate in any form would involve impermissible cooperation in wrongdoing, the Roman Catholic Petitioners have an additional reason for concern. For Catholics, the judgment of their bishops on religious matters of faith and morals is entitled to deference, respect, and obedience. The bishops are viewed as "authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice." Catechism ¶ 2034.

The Catholic's individual conscience "should take account of the authoritative teaching of the Magisterium on moral questions," and "[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church." *Id.* ¶ 2039. Specific guidance from the bishops on moral questions, therefore, is to be treated as highly persuasive by Catholic believers.

In this case, the United States Conference of Catholic Bishops has expressed "vigorous and united opposition" to the Mandate as infringing upon the religious freedom of Catholic employers. United States Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty* (2012), *at* http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf. Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already instructed that "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization." Directives ¶ 70. Furthermore, the Petitioners in these consolidated cases include several Catholic bishops and dioceses, and numerous other Catholic bishops and dioceses have similar challenges to the Mandate pending in the lower courts. The other Catholic Petitioners can reasonably infer that the Catholic bishops' categorical condemnations of the Mandate counsel against their compliance in these circumstances.

4. Petitioners may reasonably conclude that no proportionate reason justifies material cooperation in grave wrongdoing, including the taking of innocent human life.

As noted above, in certain cases of material cooperation, many Catholic theologians call for the cooperator to consider whether there is a "proportionate reason" that might justify one's facilitation of another's wrongdoing. Grisez, at 876. As multiple aggravating factors are satisfied, however, an increasingly compelling proportionate reason is required to justify the cooperation. *See* Griese, at 400-01. This is particularly true where the wrongdoing includes the destruction of innocent human life, viewed as a moral wrong of the utmost gravity by the Catholic faith. *See* Griese, at 401-02 (noting that "it is difficult to suggest a reason which might justify" proximate and necessary "cooperation in an intrinsically evil procedure" such as abortion). Relatedly, due to the moral gravity of abortion, the Directives of the United States Conference of Catholic Bishops categorically forbid immediate material cooperation in abortion procedures. Directives ¶ 70. Thus, Petitioners can reasonably conclude that no proportionate reason would justify their compliance with the Mandate.

C. Petitioners Can Reasonably Conclude That Complying With the Mandate Would Cause Scandal.

Furthermore, Petitioners can reasonably

conclude that compliance with the Mandate in any form would cause "scandal" by creating the appearance of complicity in the provision of abortifacient and contraceptive services, and thus undermining their public witness of opposition to these practices. The Catholic tradition forbids "scandal," defined as encouraging or exhorting other persons to engage in wrongdoing: "Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter." Catechism ¶ 2284. "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged." *Id.* ¶ 2287 Moreover, "scandal is grave when given by those who by nature or office are obliged to teach and educate others," *id.* ¶ 2285. Thus, the Catholic Petitioners, because they are publicly identified as religious organizations committed to the Catholic faith, have reason to be especially cautious about causing scandal. Petitioners can reasonably conclude that their compliance with the Mandate in any form would create the appearance of complicity in the Mandate, undermine their public witness against the provision of abortifacients and contraceptive services, and authorize and encourage others to comply with the Mandate. This provides an independent reason for their objection to compliance with the Mandate.

CONCLUSION

For all these reasons, Petitioners' objections to complying with the Mandate via the "accommodation" reflect a reasonable interpretation and application of basic principles of Catholic moral theology. This Court should reverse the judgments of the Courts of Appeals in these consolidated cases.

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APPENDIX

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